



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 18, 2003

Ms. Chris G. Elizalde  
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.  
P.O. Box 2156  
Austin, Texas 78768

OR2003-9185

Dear Ms. Elizalde:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 192982.

The Austin Independent School District (the "district"), which you represent, received four requests for records of the district police department pertaining to sexual assault incidents at two specified high school campuses. You state that the district has no records regarding any incident at one of the high schools. The Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). You claim, however, that the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

We begin by noting that you have submitted a document for review that is not responsive to the present requests. Accordingly, this document, which we have marked, need not be released at this time.

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<sup>1</sup> We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Next, you indicate that you have redacted student identifying information from the submitted documents pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.<sup>2</sup> See Open Records Decision No. 634 (1995) (governmental body may withhold student identifying information from "education records" protected by FERPA without necessity of requesting an attorney general decision). We note, however, that the submitted documents consist of records maintained by the district police department. The district police department's records do not constitute "education records" for purposes of FERPA. See 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. § 99.8(b)(1) (2003) (defining law enforcement records); Open Records Decision No. 612 (1992) (term "education records" does not include records maintained by law enforcement unit of educational agency or institution created by that law enforcement unit for purpose of law enforcement). Thus, the student identifying information you have redacted from the submitted district police department records may not be withheld under FERPA in this case. Thus, we will consider whether this information is excepted from disclosure pursuant to your other claimed exceptions.

We must first address the district's obligations under section 552.301 of the Government Code with respect to a portion of the sample documents you have submitted for review. Under section 552.301(e), a governmental body receiving an open records request for information that it wishes to withhold pursuant to one of the exceptions to public disclosure is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. You state that the district received the first request at issue on September 29, 2003. Accordingly, the district was required to submit the information required under section 552.301(e) no later than October 20, 2003. You delivered additional representative samples of responsive information to this office on October 22, 2003. Thus, we find that the district failed to comply with the procedural requirements of section 552.301 with respect to this information.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. See Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin

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<sup>2</sup>FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. See 20 U.S.C. § 1232g(b)(1); see also 34 C.F.R. § 99.3 (defining personally identifiable information).

1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982).

Generally, a governmental body may demonstrate a compelling reason to withhold information by a showing that the information is made confidential by another source of law or affects third party interests. *See* Open Records Decision No. 630 (1994). Section 552.108 is a discretionary exception that protects a governmental body's interests and, as such, may generally be waived by the governmental body. *See* Open Records Decision No. 177 (1977) (governmental body may waive statutory predecessor to section 552.108); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Discretionary exceptions generally cannot provide a compelling reason to withhold information from the public. However, the need of another governmental body to withhold information under section 552.108 can provide a compelling reason to withhold information. *See* Open Records Decision No. 586 at 3 (1991). You state, and provide documentation showing, that the Office of the District Attorney for Travis County (the "district attorney") informed the district of the district attorney's need to withhold the information under 552.108 and objected to its release. Furthermore, your claim under section 552.101 can provide a compelling reason to withhold the information. Accordingly, we will address your claims under sections 552.101 and 552.108 of the Government Code with respect to all of the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information made confidential by other statutes. The district and the district attorney both contend that the submitted information is confidential under section 58.007 of the Family Code. Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential under section 58.007, which provides in pertinent part as follows:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and

(3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

Section 58.007 generally applies to law enforcement records of a juvenile suspect. Upon review, we note that the information at issue does not contain any information that provides the identity of any juvenile criminal suspect. Thus, we determine that the information is not excepted from disclosure under section 552.101 in conjunction with section 58.007 of the Family Code.

Next, section 552.108 of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime.” Gov’t Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov’t Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

You state that the information at issue relates to an ongoing criminal investigation by the district attorney. Furthermore, the district attorney also states that the information at issue in the present requests relates to the ongoing investigation, and requests that the district withhold the information from disclosure. Based on our review of the submitted comments and information, we determine that section 552.108 is applicable. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases); Open Records Decision Nos. 474 (1987), 372 (1983) (where an incident involving allegedly criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information that relates to the incident); *see also* Open Records Decision No. 586 (1991). Thus, we find that the submitted information is generally excepted from disclosure pursuant to section 552.108(a)(1) of the Government Code as the proper custodian of the information.

However, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov’t Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle*. *See* 531 S.W.2d at 186-87. We note that portions of the basic information are protected by common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).<sup>3</sup> The type of information considered intimate and embarrassing by the Texas

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<sup>3</sup>Section 552.101 also encompasses the doctrine of common-law privacy.

Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. The district must withhold the identifying information of a sexual assault victim, which we have marked, pursuant to section 552.101 and the doctrine of common-law privacy.

With respect to the remaining basic information that is not protected by privacy, because the prosecution interest at issue here belongs to the district attorney, the department must consult with the district attorney and release basic information, including a detailed description of the offense. See Open Records Decision No. 127 (1976) (summarizing types of information made public by *Houston Chronicle*). Pursuant to section 552.108(a)(1), the department may withhold the remaining submitted information from disclosure.

In summary, with the exception of basic information about the incident at issue, the district may withhold the submitted information pursuant to section 552.108(a)(1) of the Government Code. We have marked portions of the basic information that must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. The district must consult with the district attorney and release the remainder of the basic information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body

fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



David R. Saldivar  
Assistant Attorney General  
Open Records Division

DRS/sdk

Ref: ID# 192982

Enc: Submitted documents

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